

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JLM, Minor.

UNPUBLISHED

April 22, 2014

No. 318585

Newaygo Circuit Court

Family Division

LC No. 13-000734-AM

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Petitioner appeals from the trial court order that denied her petition to adopt her granddaughter, JLM. Because the trial court did not err by finding that the denial of consent to adopt by the superintendent of the Michigan Children's Institute (MCI) was not arbitrary and capricious, we affirm.

The parental rights of JLM's mother were terminated in regard to JLM on March 23, 2012. From the beginning of the underlying termination case, JLM was placed in foster care. After the rights of the mother were terminated, petitioner requested that she be considered for the adoption of JLM. However, on February 1, 2013, the superintendent of the MCI denied petitioner consent to adopt JLM. On March 8, 2013, petitioner moved the trial court to set aside the MCI superintendent's decision and petitioned the trial court for the adoption of JLM. On June 20, 2013, the trial court held a hearing pursuant to § 45 of the Adoption Code, MCL 710.21 *et seq.* On August 26, 2013, the trial court denied petitioner's petition to adopt JLM, finding that the MCI superintendent's decision was not arbitrary and capricious.

Petitioner argues that the trial court committed clear legal error by finding that the MCI superintendent did not act arbitrarily and capriciously. In *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008), we stated:

Pursuant to MCL 710.45, a family court's review of the superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent's withholding of consent was arbitrary and capricious. Whether the family court properly applied this standard is a question of law reviewed for clear legal error.

A court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

In this case, the MCI superintendent relied on three factors in denying petitioner's petition to adopt JLM: the length of time JLM had lived in a stable, satisfactory environment with her foster parent and the desirability of maintaining the continuity of that environment; the "significant concerns" about the petitioner's ability to assure the physical and emotional well-being of JLM on a permanent basis, and; the lack of a "significant psychological relationship" between JLM and petitioner.

During the § 45 hearing, evidence was introduced to suggest that JLM had lived in a stable, satisfactory environment with her foster parent for most of her life and that it was desirable to maintain the continuity of that environment. The MCI superintendent testified that he received information that JLM had been with her foster family since April 2011 and had formed a close psychological attachment to her foster parent. The MCI superintendent testified that when a young child like JLM is placed in a stable, structured environment and is well cared for, the child develops a relationship with the caregiver that is important in establishing a sense of trust and confidence in a young child. The MCI superintendent indicated that JLM had been with her foster parent approximately 22 months at the time of the MCI superintendent's decision and that JLM was thriving with her foster parent. JLM's guardian ad litem also testified that JLM had grown and developed while in her foster parent's care.

Accordingly, the MCI superintendent's factor regarding the length of time JLM had lived in a stable, satisfactory environment with her foster parent and the desirability of maintaining the continuity of that environment was factually supported and provided a "good reason" for the MCI superintendent to withhold consent. *In re CW*, 488 Mich 935, 936; 790 NW2d 383 (2010). The MCI superintendent and the trial court also noted the estrangement of the child's family. It follows, as the trial court concluded, that the MCI superintendent's decision, based on these factually supported determinations, was not arbitrary and capricious. *Keast*, 278 Mich App at 424-425.

Before the trial court, petitioner did not offer clear and convincing evidence that withholding consent on this ground was arbitrary and capricious. In fact, she did not challenge those findings with any evidence. The trial court's holding was a proper application of the law and the court did not commit clear legal error by holding that there was not clear and convincing evidence that the MCI superintendent's decision was arbitrary and capricious. *Keast*, 278 Mich App at 423.

Nevertheless, petitioner argues that the MCI superintendent acted arbitrarily and capriciously because "he [did] not consider all of JLM's individual circumstances before he issue[d] his decision." Petitioner relies on Justice Corrigan's concurrence in *CW*, 488 Mich at 940-941 (CORRIGAN, J). However, in making her argument, petitioner ignores Justice Corrigan's statement that at a § 45 hearing a reviewing court may address whether the *bases for the MCI superintendent's decision* were "without factual support." *CW*, 488 Mich at 940-941 (CORRIGAN, J., concurring). The Supreme Court's order does not state that the MCI superintendent must consider *all* of a child's circumstances before issuing a decision and cannot rely on good reason(s) if factually supported. *CW* requires that the trial court consider evidence at a § 45 hearing regarding whether the MCI superintendent's factors that support the superintendent's decision had factual support. *CW*, 488 Mich at 936. In this case, it did.

Petitioner provides approximately 30 factual allegations that she claims refute many of the conclusions the MCI superintendent and the trial court “made about her and her qualifications for adopting JLM.” However, even assuming that petitioner’s allegations are true, none of those allegations cast any doubt on the MCI superintendent’s conclusion that JLM had a stable, satisfactory environment in her placement with her foster parent and that it was desirable to maintain the continuity of that placement of the child in the only stable home she has ever known. Moreover, the 30 allegations advanced by petitioner pertain only to the second two reasons cited by the MCI superintendent, i.e., petitioner’s ability to assure the physical and emotional well-being of the child on a permanent basis and the lack of a “significant psychological relationship” between the child and petitioner. In any event, we have reviewed petitioner’s allegations and conclude that they do not establish error on the part of the MCI superintendent in reaching these second two reasons for denying consent. Accordingly, no clear error by the trial court has been shown.

Petitioner also argues that the trial court misunderstood its role in the § 45 hearing because it excluded evidence that it should have admitted. “[T]he decision whether to admit or exclude evidence is reviewed for an abuse of discretion.” *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

First, Petitioner argues that the trial court improperly precluded the MCI superintendent from providing detailed testimony regarding the Department of Human Services’ (DHS) efforts to place JLM with family members during the underlying termination case. During the § 45 hearing, the MCI superintendent testified that when he reviewed a case, he would “try to understand what efforts were made to consider relatives at the beginning of the case.” The superintendent said that, in this case, “there were efforts made by DHS to consider relatives as potential placements, but for a variety of reasons the child was not placed with any relatives.” Petitioner’s counsel then asked the superintendent what effort the DHS made and which relatives were considered by the DHS. Counsel for the DHS objected on relevance grounds. The trial court said that he essentially agreed with the relevance objection, and then explained:

I don’t think he’s required to answer the detail [sic]. If he wants to answer generally, fine, but I don’t think he—otherwise, we’re going to be here all day and we’re going to have to go back and review every report that was ever submitted and the DHS file is significant. It’s six inches at least. . . . [s]o, if you want to ask him whether he considered and looked into it, fine, but I’m not going to require him to detail it.

The MCI superintendent then testified that the DHS fully explored every family member that expressed an interest in JLM, except for one relative living in Ohio.

Petitioner apparently argues that the MCI superintendent should have been required to testify regarding all of the facts related to the DHS’s decision not to place JLM with relatives. However, MRE 401 provides that “[r]elevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 402 provides that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the

Supreme Court. Evidence which is not relevant is not admissible.” As discussed above, the MCI superintendent’s findings must have factual support. *CW*, 488 Mich at 936. Accordingly, evidence having any tendency to make the existence of the bases of the MCI superintendent’s decision more probable or less probable was relevant in this case. *Id.*; MRE 401, 402.

The MCI superintendent relied on three factors in denying petitioner’s petition to adopt JLM, none of which were based on the DHS’s decision not to place JLM with relatives during the underlying termination case. In other words, the superintendent did not rely on the DHS’s decision not to place JLM with relatives, significantly petitioner, in denying the petition. Accordingly, detailed testimony regarding the reasons why the DHS decided not to place JLM with relatives was irrelevant to the ultimate issue because it would not have made the existence of the bases of the MCI superintendent’s decision more or less probable. MRE 401, 402. Therefore, the trial court did not abuse its discretion by excluding that testimony.

Petitioner also argues that the trial court improperly precluded the MCI superintendent from providing detailed testimony regarding factors other than the factors he used to reach his decision. Petitioner’s counsel tried to elicit testimony from the MCI superintendent about factors he did not put into decision. Counsel for the DHS objected on the grounds that the issue had been asked and answered, but the trial court excluded the testimony on the grounds that the MCI superintendent was not required to address factors other than the factors in his decision. *Keast*, 278 Mich App at 425, provides that

[t]he initial focus of the hearing is on the reasons given for withholding consent to the adoption. It is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously. [Citation omitted.]

Accordingly, any testimony the MCI superintendent could have provided regarding factors other than the factors he used to reach his decision would have concerned factors that were not at issue in this case. Therefore, that testimony would have been irrelevant because it would not have made the existence of the bases of the MCI superintendent’s decision in this case more or less probable. MRE 401, 402. While such evidence is not always irrelevant, in this case, the trial court did not abuse its discretion by excluding that testimony.

Next, petitioner argues that the trial court improperly precluded the MCI superintendent from answering a question about whether there might have been a different outcome in this case if petitioner had been provided with more frequent visitation with JLM. The DHS’s counsel objected on relevance grounds. The trial court initially sustained the objection, but subsequently and without explanation allowed petitioner’s counsel to ask the question. The MCI superintendent testified that if petitioner had been allowed more contact with JLM, it could have affected his decision. Accordingly, the trial court allowed the testimony petitioner claims was excluded.

Petitioner additionally argues that the trial court improperly precluded the MCI superintendent from answering a question about whether it was contradictory for the DHS to have a mission to reunite family members during termination of parental rights cases, but the DHS may use a family member’s lack of contact with a child to deny the family member consent

during an adoption case. The DHS's counsel objected to that question on relevance grounds. The trial court sustained that objection, ruling that the MCI superintendent's opinion of the DHS policy was irrelevant to this case. The MCI superintendent did not inject his opinion of the DHS policy into his decision and, therefore, that testimony would have been irrelevant because it would not have made the existence of the bases of the MCI superintendent's decision in this case more or less probable. MRE 401, 402. The trial court did not abuse its discretion in excluding that testimony under the facts of this case.

Finally, petitioner argues that the trial court improperly precluded Julie Cook, one of JLM's relatives, from testifying that she expressed interest to the DHS of having JLM placed with her during the underlying termination case and that the DHS never contacted Cook. The DHS's counsel objected to the testimony on relevance grounds. Petitioner's counsel argued that the evidence was admissible to show the "underlying arbitrariness" of the DHS being able to deny families placement of their relatives. However, the trial court sustained the objection. Cook was not one of the relatives interested in adopting JLM in this case, and the fact that Cook may not have been contacted by the DHS in a different proceeding was irrelevant because it would not have made the existence of the bases of the MCI superintendent's decision in this case more or less probable. MRE 401, 402. Moreover, whether or not the DHS policies are arbitrary was not an issue before the trial court. The trial court did not abuse its discretion by excluding that testimony.

In sum, the trial court did not abuse its discretion in excluding the evidence challenged on appeal. *Elezovic*, 472 Mich at 419. Therefore, petitioner has not shown clear legal error in the trial court's application of the law to this case. *Keast*, 278 Mich App at 423.

Petitioner next argues that MCI superintendent's decision was arbitrary and capricious because it violated the United States and Michigan constitutional guarantees of procedural due process and the fair and just treatment clause of the Michigan Constitution. We review these unpreserved constitutional claims for outcome-determinative plain error. *In re Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008).

Petitioner first argues that the MCI superintendent's decision was arbitrary and capricious because it violated the United States and Michigan constitutional guarantees of due process. No person may be deprived of life, liberty or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. In *In re Parole of Hill*, 298 Mich App 404, 412; 827 NW2d 407 (2012) (citations and quotations omitted), we explained that:

Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property. Whether the due process guarantee is applicable depends initially on the presence of a protected "property" or "liberty" interest. It is only when a protected interest has been found that we may proceed to determine what process is due.

In *Brinkley v Brinkley (On Remand)*, 277 Mich App 23, 31; 742 NW2d 629 (2007), we noted that "grandparents have no fundamental [due process] right to a relationship with their grandchildren." Applying *Brinkley* to this case, petitioner does not have a meritorious

procedural due process claim because she did not have a fundamental due process interest in JLM. *Parole of Hill*, 298 Mich App at 412. Accordingly, petitioner fails to show plain error.

Petitioner also argues that the MCI superintendent's decision was arbitrary and capricious because it violated the fair and just treatment clause of the Michigan Constitution. Const 1963, art 1, § 17, provides, in relevant part, that "[t]he right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." In *Carmacks Collision, Inc v Detroit*, 262 Mich App 207, 210-211; 684 NW2d 910 (2004), we used a dictionary to define the word "investigation" as set forth in the fair and just treatment clause as "the act or process of investigating or the condition of being investigated" or "a searching inquiry for ascertaining facts; detailed or careful examination."

Petitioner correctly notes that State of Michigan administrative agencies are considered a part of the executive branch of government. See *Straus v Governor*, 230 Mich App 222, 231; 583 NW2d 520 (1998), *aff'd* 459 Mich 526 (1999). Because it appears that Catholic Charities was employed to investigate on behalf of a state agency, we agree with petitioner that it was subject to the fair and just treatment clause. Nonetheless, petitioner has failed to establish plain error.

Petitioner first argues that "[Catholic Charities] and the MCI superintendent unfairly and unjustly engaged in only a limited investigation of [petitioner], her circumstances, and her relationship with her granddaughter." Petitioner does not explicitly indicate how the investigation was deficient, instead alleging that "[Catholic Charities] implied that they would collect additional information that would be made part of the file, and then that information was not in fact included in the file." Petitioner's argument appears to concern the fact that petitioner provided "new information" to a Catholic Charities investigator during a case conference and the investigator did not pass that information on to the MCI superintendent. Petitioner also alleges that the MCI superintendent "did not conduct his own investigation or do anything more than repeat the recommendations of [Catholic Charities]."

Regardless of the accuracy of petitioner's allegations concerning the thoroughness of the investigations, she must show outcome determinative plain error to obtain relief. Here, petitioner does not provide this Court with a specific explanation of what information Catholic Charities and the MCI superintendent failed to consider or how that additional information would have changed the outcome of the case. Moreover, even if we were to assume that the additional information considered in this issue was the same as the additional information gleaned from the approximately 30 factual allegations petitioner made, she would not show outcome determinative plain error.

None of petitioner's allegations cast any doubt on the MCI superintendent's decision that JLM had a stable, satisfactory environment in her placement with her foster parent and that it was desirable to maintain the continuity of that placement. That factor was a "good reason" for the MCI superintendent to withhold consent and it possessed factual support. *CW*, 488 Mich at 936; *CW*, 488 Mich at 940-941 (CORRIGAN, J., concurring). *Keast* provides that where there is a factually supported good reason for the MCI superintendent to withhold consent, the MCI superintendent's decision is not arbitrary and capricious. *Keast*, 278 Mich App at 424-425.

Thus, the record demonstrates that the MCI superintendent's decision to withhold consent, based solely on the factual support for the factor that JLM lived in a stable, satisfactory environment with her foster parent and it was desirable to maintaining the continuity of that environment, was not arbitrary and capricious. *Id.* And, as discussed, that factor was the only factor the trial court relied upon in reaching its decision. Based on that factor, the trial court did not commit clear legal error by holding that there was not clear and convincing evidence that the MCI superintendent's decision was arbitrary and capricious. Accordingly, petitioner has failed to show that any failure on Catholic Charities' or the MCI superintendent's part to investigate this case in the manner she claims affected the outcome below.

Second, petitioner alleges that the MCI superintendent "withheld consent to adopt knowing that the information he had about [petitioner] was incomplete." At the hearing, the MCI superintendent said that he was not surprised that information provided to Catholic Charities during petitioner's case conference was not passed on to him. Petitioner relies on that testimony to argue that the MCI superintendent *knew* that the information he had was incomplete at the time that he made his decision. However, there is a difference between knowing one's information is incomplete at the time of a decision, and indicating no surprise after the fact that one's information was incomplete at the time of making the decision. Regardless, petitioner must show that the MCI superintendent's incomplete information affected of outcome below.

As discussed above, the approximately 30 factual allegations petitioner makes are apparently the "additional information" to which she refers. However, none of petitioner's allegations cast any doubt upon the MCI superintendent's factor that JLM had a stable, satisfactory environment in her placement with her foster parent and that it was desirable to maintain the continuity of that placement. Based on that factor, the trial court did not commit clear legal error by holding that there was not clear and convincing evidence that the MCI superintendent's decision was arbitrary and capricious. Accordingly, petitioner fails to show that any incompleteness of the MCI superintendent's information affected the outcome below.

Third, petitioner argues that both Catholic Charities and the MCI superintendent violated MCL 722.954a(5), which provides:

Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child.

Petitioner provides no authority for the proposition that MCL 722.954a(5) applied to this case. In *In re AEG*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket No. 316599), the maternal grandparents of four children attempted to adopt those children after their parents' rights had been terminated. *Id.* at 1-2. The grandparents were allowed to adopt two of the siblings, but consent was not given in regard to the two remaining siblings. *Id.* at 2. After the trial court refused to find that the MCI superintendent's decision not to grant consent was arbitrary and capricious, the grandparents appealed. *Id.* Among other claims, the grandparents argued that "the trial court erred by not applying the statutory

preference for relative placement under MCL 722.954a(5) to MCI's adoption decision." *Id.* at 4. We rejected that argument, stating:

A review of the plain and unambiguous language of MCL 722.954a indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding; there is no indication that the statute was intended to apply to MCI's adoption decisions after termination. See MCL 722.954a(2); MCL 722.954a(3)(a); MCL 722.954a(4)(a). See also *In re Conservatorship of Townsend*, 293 Mich App [182,] 187[; 809 NW2d 424 (2011)] ("If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written."). Moreover, petitioners do not cite to any case applying MCL 722.954a in the context of an adoption proceeding or a Section 45 hearing. There is no basis for this Court to conclude that MCL 722.954a(5) applies to MCI's adoption decision. [*AEG*, unpub op at 5.]

Relying on *AEG*, we refuse to apply MCL 722.954a(5) in regard to petitioner's fair and just treatment clause argument in this case. MCL 722.954a addresses what happens after a child is placed in a supervising agency's care. MCL 722.954a(1). Pursuant to MCL 722.945a(2), "Upon removal, as part of a child's initial service plan," relatives should be identified, located, notified and consulted to determine if the child can be placed with a fit and appropriate relative. MCL 722.954a(5) requires special consideration and preferences to relatives. Nothing in the plain language of MCL 722.954a makes it applicable to the case at hand. Petitioner fails to show any outcome-determinative plain error in the fact that Catholic Charities and the MCI superintendent did not apply MCL 722.954a(5).

Finally, petitioner argues that the MCI superintendent "failed to fully consider the best interest factors, selectively relying on certain factors and criteria that disadvantaged [petitioner]." Petitioner notes that MCL 710.22(g) and ADM 820 of the Adoption Services Policy Manual for the DHS provide that the best interests of the child may be found using the following factors:

(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.

(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.

(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father, and of the adoptee.

(viii) The home, school, and community record of the adoptee.

(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

[MCL 710.22(g).]

During the § 45 hearing, the MCI superintendent acknowledged that, in reaching his decision, he did not consider petitioner's ability to provide medical care for JLM, petitioner's mental and physical health, or petitioner's willingness to adopt JLM's future siblings.

Again, as discussed above, the trial court's opinion was based on the MCI superintendent's factor that JLM had a stable, satisfactory environment in her placement with her foster parent and that it was desirable to maintain the continuity of that placement. And, as discussed, based on that factor, the trial court did not commit clear legal error by holding that there was not clear and convincing evidence that the MCI superintendent's decision was arbitrary and capricious. Petitioner fails to show outcome-determinative plain error in regard to the MCI superintendent's failure to consider all of the adoption best-interest factors under the fair and just treatment clause.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro